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# In the Supreme Court of the United States

OCTOBER TERM, 1978

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UNITED TELEGRAPH WORKERS, AFL-CIO, PETITIONER

*v.*

NATIONAL LABOR RELATIONS BOARD, ET AL.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

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## BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 571 F. 2d 665. The decision and order of the National Labor Relations Board (Pet. App. 25a-54a) are reported at 224 NLRB 274.

### JURISDICTION

The judgment of the court of appeals was entered on February 24, 1978. The petition for a writ of

certiorari was filed on May 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

## QUESTION PRESENTED

Whether substantial evidence supports the Board's finding that the Western Union Telegraph Company and its parent and four subsidiary corporations do not constitute a single employer for purposes of the National Labor Relations Act.

## STATUTORY PROVISIONS INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*), are set forth at Pet. 3.

## STATEMENT

### A. The Board's Findings of Fact

The Western Union Telegraph Company ("Telegraph") has operated for many years as a common carrier of record communications (Pet. App. 27a).[1] Telegraph's business is regulated by the Federal

[1] In addition to the familiar telegram, Telegraph's services include teleprinter exchange services (Telex and TWX), in which a subscriber can communicate with any other subscriber by attaching his teleprinter terminal (obtained from Telegraph or from an independent company) to Telegraph's transmission lines; and private wire services, in which a customer is provided with a customized internal communications system (Tr. 621-623, 630-635, 396-397).

"Tr." refers to the transcript of the Board hearing; "GCX," to the General Counsel's exhibits; and "RWX," to respondents' exhibits.



Communications Commission, and its prices are determined according to specified "tariffs," which must be approved by the FCC (Pet. App. 27a; Tr. 618-619, 630-632, 657-661; RWX-27).[2] Since 1945, petitioner Union has been the certified bargaining representative of a unit of Telegraph's employees throughout the United States (with the exception of the New York Metropolitan division in which another union was certified) (Pet. App. 60a-61a).[3] Telegraph and the Union negotiated contracts for this unit of Telegraph employees in 1968, 1971, and 1973 (Pet. App. 164a, 166a, 170a; Tr. 389-394; GCX-41, -42, -43).

In the mid-1960's, because its mechanical transmission facilities had become obsolete and worn out, Telegraph had to undertake a billion dollar Modernization Program to replace its existing system with computerized electronic facilities capable of handling telegram transmission as well as the newer services (see n. 1, *supra*) in a single integrated system (Pet. App. 27a; Tr. 646-647, 675-676, 781-782, 784-786).

[2] Telegraph also provides several minor untariffed services as incidental adjuncts to its record communications business. It sells special teleprinter paper to its Telex and TWX customers, performs maintenance on communications equipment under separate maintenance contracts, and delivers candy (and formerly other gift items) supplied by an outside company along with a tariffed telegram under its "Candygram" scheme for promotion of telegram services. (Pet. App. 35a-36a; Tr. 635-636, 679-680, 686-687, 689-692.)

[3] See *Western Union Telegraph Company*, 58 NLRB 1283, modified, 61 NLRB 110.

At the same time, the profitability of Telegraph's business began to decline significantly as demand for telegraph services was increasingly undermined by competition from new, technologically advanced communications systems offered by unregulated companies (Tr. 638, 647-648, 654-656). In addition, the FCC's *Carterfone* decision[4] eliminated Telegraph's monopoly over the sale and lease of terminals for attachment to its own transmission lines; as a result, independent companies could sell or lease terminals for attachment to Telegraph's lines on an untariffed, unregulated basis, while Telegraph was required to continue leasing its terminals, on request, exclusively on a tariffed basis (Pet. App. 67a-68a; RWX-23, Tr. 640-646). These developments persuaded Telegraph that, in order to continue being profitable to its investors, it would have to diversify its business into new, unregulated areas (Pet. App. 27a; Tr. 656).

There were, however, three obstacles to Telegraph's diversification plans. First, Telegraph's New York corporate charter, and the New York Transportation Corporations Law which regulated it, precluded Telegraph from engaging in any business other than telegraph communications (Pet. App. 27a-28a; Tr. 657-659, RWX-27).[5] Second, Telegraph had committed its entire financing capability to the Modernization Pro-

[4] 13 F.C.C. 2d 420.

[5] The New York Public Service Commission actively enforced this restriction, rejecting, as *ultra vires*, Telegraph's attempt to acquire a news release distribution company called P.R. Newswire (Pet. App. 73a; Tr. 660-661; GCX-39, p. 14).



gram, and was therefore unable to finance any new business ventures without undermining its communications services. Finally, in order to prevent common carriers from subsidizing nonregulated services with income from regulated services by commingling costs, the FCC had effectively prohibited common carriers from engaging in unregulated data processing activities, except through separate corporations which operated separately (Pet. App. 28a, 35a, 71a-73a; RWX-24A, -24B, -25, -26).

Accordingly, in 1970, Western Union Corporation ("WUC") was incorporated in Delaware as a holding company. Unlike Telegraph, WUC had a broad corporate charter, was not a common carrier subject to FCC regulation, and had no contractual limitations on its financing capabilities. WUC acquired all of the voting stock of Telegraph in exchange for shares in WUC, and then began to invest in the unregulated businesses which were unavailable to Telegraph, both by acquiring existing companies[6] and by establishing new ones (Pet. App. 28a, 74a; Tr. 653-654, 656, 659, 662-663). During 1970, WUC established Western Union Data Services Company ("DSC") to compete with about one hundred other independent hardware leasing companies engaging in the unregulated terminal leasing business opened up by the *Carterfone* decision (*supra*, p. 4), and Western Union Realty Corporation ("WURC") to engage in the real estate

[6] One of WUC's first acquisitions was P.R. Newswire, which the New York Public Service Commission had refused to allow Telegraph to acquire (Tr. 660-661; GCX-39, p. 14).

business, conducting its own land investment and development program as well as selling its property management services to the public (Pet. App. 28a-29a; Tr. 665, 988-989, 999-1002, 1100-1101; GCX-16, -18, -21A, -21B, -23A, -148, -152, -154). In 1971, Teleprocessing Industries, Inc. ("TII") was established to sell information and data processing systems and services to the public (Pet. App. 28a; Tr. 791-795, 858-870).[7] In 1973, GiftAmerica ("GA") was activated to engage in the unregulated business of selling and delivering gift merchandise through franchised dealers by means of both over the counter sales and a centralized national telephone ordering service (Pet. App. 28a; Tr. 713-715, 734-741).[8]

Telegraph conducted business with the new corporations pursuant to detailed formal contracts, each company being fully compensated for services rendered to each other (Pet. App. 31a). Telegraph leased office space, along with related administrative services such as mail distribution and document reproduction, to some of the other corporations, as well as to non-affiliated companies, pursuant to formal leases (Pet. App. 31a, 32a; GCX-21C, -21H, -21I, -21K, -21L, Tr. 113-115, 221- 222, 280-283, 310-311, 474-477). DSC subcontracted some of its terminal installation and maintenance work to several com-

[7] TII was also responsible for coordinating the activities of other data-processing firms which WUC had acquired (Tr. 847-857).

[8] GA soon proved unsuccessful and ceased operations in August of 1974 (Pet. App. 28a).



panies, including Telegraph, on a competitive basis (Pet. App. 31a-32a; Tr. 1007-1014).[9] GA contracted for support services with several companies, including Telegraph, which furnished a telephone answering service paid for on a per call basis (Pet. App. 33a; Tr. 719-720, 734-738, 740, 745, 753). Telegraph hired TII to complete its Modernization Program, which included managing the new computer installations until they were operating smoothly and training people to operate these installations; Telegraph thereafter assumed the management of these systems (Pet. App. 32a-33a; Tr. 788-790, 795-805, 954, GCX-21J). For a time, Telegraph was one of DSC's terminal customers (Pet. App. 32a; 1010-1011, 1017, 1020-1021), and Telegraph was one of WURC's tenants and a customer of WURC's property management services (Pet. App. 33a-34a; GCX-21B, -23A).

Each corporation has its own board of directors, which conducts its own meetings and makes its own business decisions (Pet. App. 38a; GCX-77-147, -155-160, -166-177, -180-191, -204-218). The daily management of each corporation, including the conduct of its employee relations, is handled by its own president and other officers with designated areas of responsibility (Pet. App. 38a-39a, 41a-42a; Tr. 706-707, 719, 847-848, 898-905, 926-927, 965-966, 1022, 1028-1030, 1070, 1074-1076; GCX-4, -8, -16, -163, -168, -189 (3rd page)). Although there are some

[9] DSC also purchased warehousing space as well as some administrative services from Telegraph and from other companies (Tr. 1011-1013, 1102-1105).

individuals who serve as officers or directors in more than one of the corporations, none of the corporate presidents has any position with any of the other companies, and none of Telegraph's eighteen officers has any position with any other company (Pet. App. 29a-30a; GCX-4 (p. 3), -8 (last page), -12 (p. 7), -16 (p. 4), -248).

Telegraph's employee relations (including relations with the Union) are handled by its Vice President for Employee Relations, G. P. Kent, and his assistant, Robert J. Lackey, neither of whom has any position with any of the other corporations (Pet. App. 30a, 41a-42a; Tr. 413, 459, GCX-21, -24G, -26 (h), -49, -53, -248). TII has its own employee relations department headed by its own manager of employee relations (GCX-8, pp. 1, 3); DSC's president and vice president handle its labor relations (GCX-12, p. 3); WURC's president and vice president for administration handle its labor relations (GXC-16, p. 3); and WUC's president and vice president for finance are responsible for its labor relations policies (GCX-4, p. 2). Each corporation established its own labor relations policies, and, after a short transitional period, each adopted its own fringe benefits plans, which are different from Telegraph's (Pet. App. 41a; GCX-4, -8, -12, -16, -20, -42, -43, RWX-12). Each corporation also conducted its own hiring program, determining for itself which functions it would obtain from subcontractors and which would be performed by its own employees (Pet. App. 31a-32a; Tr. 835-838, 955-959, 1011-1015, 1022-1024).



No bargaining unit employees were transferred from Telegraph to any of the new corporations, but the new corporations did not refuse to hire former Telegraph employees who applied for work with the new companies (Pet. App. 153a; Tr. 1027-1030, 1033-1034, 1105-1107, 1118-1127).

On May 23, 1973, the Union requested all of the new corporations to recognize it as the bargaining representative of their employees (Pet. App. 170a; GCX-48). The Union made no claim that a majority of the new corporations' employees wanted the Union to represent them. When all of the new corporations refused to recognize the Union, the Union filed a charge with the Board alleging that all of the new corporations constituted a single employer with Telegraph, and that their refusal to bargain with the Union violated Section 8(a)(5) and (1) of the Act (Pet. App. 170a).

### B. The Board's Decision

The Board (with one Member dissenting) concluded, contrary to the Administrative Law Judge (ALJ), that "each corporation is a separate and independent entity and that, therefore, [Telegraph's] bargaining obligations have no application to WUC or WUC's other four subsidiaries" (Pet. App. 27a). Accordingly, the Board dismissed the unfair labor practice complaint (Pet. App. 42a-43a).

In so concluding, the Board found, contrary to the ALJ, that "the creation of the holding company and the four new subsidiaries has not fragmented [Tele-

graph's] business or had an adverse impact on [Telegraph's] bargaining unit." For, "[w]hile each of these new corporations has some nexus with [Telegraph], their businesses, which are unregulated, had not existed as part of [Telegraph] and had, therefore, not been performed by [Telegraph's] bargaining unit employees"; indeed, "the functions of the other subsidiaries could not have been performed by [Telegraph], since it was limited by its New York charter and FCC regulations to providing record communication services pursuant to tariff and subject to regulation by the FCC." (Pet. App. 34a-35a.)[10]

The Board also noted that, under settled principles, "a critical factor in determining whether separate legal entities operate as a single employing enterprise is the common control of labor relations policies and that common ownership is not determinative where such requisite common control is not shown"; moreover, "such common control must be actual or active, as distinguished from potential control" (Pet. App. 37a; footnotes omitted). The Board found that "[n]o such common control of labor relations is present herein"; indeed, "of the four key elements essential to a finding of a 'single integrated enterprise'—common ownership and financial control, common management, interrelation of operations, and centralized control of

[10] The Board further found that the ALJ had erred in finding that [Telegraph] "did engage in untariffed activities." For, the various "untariffed services" to which he referred "were only incidental to tariffed communications or services." (Pet. App. 35a.)



labor relations—only common ownership is present here" (Pet. App. 38a; footnote omitted).

### C. The Court of Appeals' Decision

A divided court of appeals affirmed the Board's decision, concluding that the Board's findings "were amply supported by substantial evidence in the record" (Pet. App. 3a).[11]

## ARGUMENT

In finding that Telegraph and the new corporations do not constitute a single employer for purposes of the Act, the Board applied the criteria which have been approved by this Court, *i.e.*, "interrelation of operations, common management, centralized control of labor relations and common ownership." *South Prairie Construction Co.* v. *Local 627, International Union of Operating Engineers*, 425 U.S. 800, 802, n. 3; *Radio Union* v. *Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256. The court of appeals found that the Board had correctly applied these principles and that its findings were supported by substantial evidence. In these circumstances, no issue warranting review by

[11] The dissenting judge "agree[d] with the court that substantial evidence supports the Board's conclusion that the elements of single employer status have not been established" (Pet. App. 16a), but he would have remanded the case to the Board to consider whether the "alter ego" and "successorship" doctrines were relevant. However, as the court noted (Pet. App. 6a-7a), the only issue raised in the proceedings before the Board and the court of appeals was whether the four criteria for determining single employer status were met here.

this Court is presented. *South Prairie Construction Co., supra*, 425 U.S. at 803-804, n. 5.

Contrary to petitioner's contention (Pet. 17-19), the court of appeals reached a different conclusion here than it did in *South Prairie, supra*, not because of a different standard of review,[12] but because the facts of the two cases are different, as the Administrative Law Judge himself noted (Pet. App. 177a). Thus, in *South Prairie*, the court of appeals found that the parent had activated a nonunion construction subsidiary in the same area of business as another construction subsidiary which had a contract with the union, for the purpose of competing in that area without the burden of a union contract. And, the nonunion subsidiary actually took business opportunities from the union firm, thus preempting work that would have been covered by the union contract. See *Local No. 627, International Union of Operating Engineers* v. *National Labor Relations Board*, 518 F. 2d 1040, 1043, 1049 (C.A.D.C.). In contrast, the Board concluded

[12] While, in *South Prairie*, the court stated that it was relevant to determine "whether, as a matter of substance, there is the 'arm's length relationship found among unintegrated companies,' " it recognized that " 'single employer' status, for purposes of the National Labor Relations Act, depends upon all the circumstances of the case," [and] that not all of the 'controlling criteria' specified [in *Radio Union* v. *Broadcast Services of Mobile, Inc., supra*] need be present * * *." *Local Union No. 627, International Union of Operating Engineers* v. *National Labor Relations Board*, 518 F. 2d 1040, 1045-1046 (C.A. D.C.). In any event, the Board's findings (*supra*, pp. 6, 9-11) show that there was an "arm's length relationship" among Telegraph and the other corporations.



here, in findings sustained by the court of appeals, that the new companies were established for legitimate business reasons having nothing to do with the Union, that they engaged in new businesses unavailable to Telegraph, and that they did not interfere with Telegraph's business or perform work which would otherwise have been done by Telegraph's employees.[13]

[13] The Board in finding, contrary to the ALJ, that Telegraph's unregulated activities were merely incidental to its regulated telegraph business (n. 2, *supra*), did not upset the ALJ's credibility determinations, but merely differed as to the conclusions to be drawn from the evidential facts. There is accordingly no merit to petitioner's suggestion (Pet. 20-21) that the Board's reversal of the ALJ was improper. See *Oil, Chemical and Atomic Workers Union, Local 4-243* v. *National Labor Relations Board*, 362 F. 2d 943, 946 (C.A.D.C.)

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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